IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1124

NATHANIEL COLEMAN,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

The petitioner, NATHANIEL COLEMAN, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, affirming the petitioner's conviction under 18 U.S.C. § 665 for theft of services.

## OPINION BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, infra, pp. 1-8.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1978. This petition for certiorari was filed less than 30 days from the beforementioned date. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254 (1).

## QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THEFT OF SERVICES IS AN OFFENSE WITHIN THE PURVIEW OF 18 U.S.C. § 665.

II. WHETHER CONFLICTING DECISION IN THE NINTH AND SEVENTH CIRCUITS AS TO WHETHER OR NOT THEFT OF SERVICES IS AN OFFENSE WILL DESTROY CERTAINTY AND PREDICTABILITY IN THE LAW.

III. WHETHER THE SEVENTH CIRCUIT'S DECISION CONFLICTS WTH SUPREME COURT DECISIONS WHICH PRESCRIBE CANONS OF CONSTRUCTION FOR CONSTRUING STATUTES.



IV. WHETHER THE SEVENTH CIRCUIT'S DECISION VIOLATED THE THIRTEENTH AMENDMENT'S PROHIBITION AGAINST SLAVERY WHEN THE COURT HELD THAT CETA WORKERS' SERVICES, WHICH WERE PAID FOR WITH FEDERAL FUNDS, WERE PROPERTY OWNED BY THE FEDERAL GOVERNMENT.

V. WHETHER THE PROHIBITION AGAINST EX POST FACTO LAWS IS VIOLATED WHEN THE COURT CONSTRUES THE WORD PROPERTY IN 18 U.S.C. § 665 TO INCLUDE SERVICES AND RETROSPECTIVELY APPLIES ITS CONSTRUCTION OF SECTION 665 TO THE ALLEGED CONDUCT OF THE ACCUSED.

VI. WHETHER THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL IS VIOLATED (A) WHEN INADMISSIBLE HATCH ACT EVIDENCE IS ADMITTED AT HIS TRIAL, AND (B) WHEN THE JURY IS IMPROPERLY INSTRUCTED BY THE TRIAL JUDGE.

## CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

United States Constitution, Amendment XIII:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

United States Constitution, Amendment VI:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of

the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

United States Constitution, Article 1, Section 9(3):

No ex post facto law shall be passed.

Federal Statute, 18 U.S.C. § 665(a):

Theft or embezzlement from manpower funds;

(a) Whoever, being an officer, director, agent, or employee of, or connected in any capacity with, any agency receiving financial assistance under the Comprehensive Employment and Training Act of 1973 embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a grant or contract of assistance pursuant to this Act shall be fined not more than $10,000 or imprisoned for not more than two years, or both; but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $100, he shall be fined not more than $1,000, or imprisoned not more than one year, or both.

Federal Statute, 29 U.S.C. § 990:

Political Activities Prohibited

The Secretary shall not provide financial assistance for any program under this Act which involves political activities; and neither the program, the funds provided therefor, nor personnel employed in the administration thereof, shall be, in any way or to any extent, engaged in the conduct of political activities in contravention of chapter 15 of title 5, United States Code [U.S.C. §§ 1501 et seq.].

Federal Statute, 42 U.S.C. § 2706(3):

(3) the term "financial assistance" includes assistance advanced by grant, agreement, or contract, but does not include the procurement of plant or equipment, or goods or services.



## STATEMENT OF FACTS

The government filed a two count indictment against Nathaniel Coleman on October 14, 1976. Appendix B, infra, pp. 1-2. Count I alleged that Coleman violated 18 U.S.C. §665 of the United States Code by stealing the services of CETA employees, and Count II alleged that the defendant violated 18 U.S.C. § 1503 of the United States Code by attempting to influence a government witness. The defendant filed a pretrial motion to dismiss Count I of the indictment because section 665 did not make theft or misapplication of services of employees of the Manpower Administration an offense, and Count II because it failed to charge an offense under Section 1503. On April 11, 1977, the defendant's motion to dismiss was denied and the trial began in the cause. However, a mistrial was declared and, after the defendant filed a second motion to dismiss the indictment, the government moved to dismiss Count II of the indictment and the motion was granted by the court.

## THE PROSECUTION

The facts establish that the City of Gary entered into an agreement with the Department of Labor to set up a program to provide employment and training for unemployed persons who were economically disadvantaged. The City of Gary created the Gary Manpower Administration to administer two programs: (1) the Adult Work Experience Program (AWE) which provided short term employment (6 months to 1 year), and (2) a Public Service Employment Program (PSE) which provided extended employment (1 to 2 years). Gary Manpower received money for administrative expenses and wages for the AWE and PSE programs from the Department of Labor.

Three AWE participants testified that they were on a special detail which cut grass, constructed a little league fence, worked around the Coroner's office, and performed clean-up work at the Mayor's house. The AWE participants also testified that they built a residential foundation for a house, built a block fence and a cyclone fence at two other houses, painted a gate at a third house, and dug a latrine at a fourth house. Finally, one AWE participant testified that he built a patio and painted at the defendant's house.

At the close of the government's case, the defendant made a motion for a judgment of acquittal. The court denied the motion and took it under consideration because the court recognized that theft of services was an offense but was unsure if section 665 covered the precise conduct complained of in the indictment.

## THE DEFENSE

The Superintendent of Park and Recreation for the City of Gary testified that the little league fence (the one constructed by the AWE people) was on city property and the wire used to construct the fence was purchased with city funds.

A bricklayer who worked for Coleman testified that he built the two brick fences and that he poured the residential foundation for the basement. A city employee testified that he cut grass for Coleman after work, and Coleman's brother-in-law testified that he worked with Coleman and Coleman's son at the Coroner's office. The Coroner testified that the work at his office was never performed during business hours.

Nathaniel Coleman testified that he was the Assistant Director of General Services in 1975 and that the Coleman Construction Company, a one man operation, was his company. The witness testified that he was a part-time custodian at the Lake County Coroner's office, and that he had a verbal agreement to cut grass in his neighborhood with Hughes Realty. The witness testified that he built the latrine on a Saturday with two AWE participants and that he put in a footing for a customer and constructed a decorative block fence for two sisters.



Coleman also testified that two AWE participants worked for him on two or three different Saturdays: they poured a driveway for the witness, one for his brother-in-law, and on another occasion, one AWE participant did some exterior painting at a friend's house. The witness testified that some of the AWE participants were assigned to the cosmetic crew which cleaned vacant lots, picked up debris and cut grass on private property, parkways, and vacant lots. In addition, the clean-up crew would clean up debris and garbage when citizens, including the Mayor, requested such work. Finally, the witness testified that two of his primary accusers (AWE participants) were suspended by the Director of Personnel for misconduct although the letters had his signature on them.

## REASONS FOR GRANTING THE WRIT

### I.

### THE SEVENTH CIRCUIT DECIDED A QUESTION OF FEDERAL LAW (THAT THEFT OF SERVICES IS AN OFFENSE WITHIN THE PURVIEW OF 18 U.S.C. § 665) WHICH SHOULD BE, BUT HAS NOT BEEN DECIDED BY THE SUPREME COURT.

In *United States* v. *Coleman*, the Seventh Circuit decided that theft of services is an offense within the purview of 18 U.S.C. § 665. Section 665 was promulgated as part of the "Comprehensive Employment and Training Act (CETA) of 1973" which became effective on December 29, 1973. 29 U.S.C. § 801. And section 665 is a part of the embezzlement and theft statutes in chapter 31, title 18 of the United States Code and has been in existence for five years, yet the Seventh Circuit was the first Court of Appeals to construe the statute.

The Seventh Circuit held that theft of services was an offense within the purview of 18 U.S.C. § 665, despite the fact that the preamble for section 665 provides that the prescription applies to "theft of manpower funds," and despite the fact that services is not delineated in the prescription. See 18 U.S.C. § 665. Section 665 is violated when the accused embezzles, willfully misapplies, steals or obtains by fraud "money", "funds", "assets", or "property", which is the subject of the grant or contract of assistance. See 18 U.S.C. § 665.

Finally, section 665 was not violated in the instant case because theft of services was not an offense delineated in the prescription. Congress promulgated the Comprehensive Employment Training Act (29 U.S.C. § 801),



and authorized the Secretary of Labor (hereinafter Secretary) to make financial assistance available to prime sponsors (e.g. City of Gary) to carry out the CETA programs. 29 U.S.C. § 812 (a)(2). Then in 1975, Congress authorized that two and one half billion dollars ($2,500,000) would be appropriated to fund the programs and the Secretary was authorized to enter into arrangements with eligible applicants to make assistance available for the purpose of providing transitional employment for unemployed persons in jobs providing public service. 29 U.S.C. § 962. Congress clearly appropriated money for the CETA programs and not people or services. It is also clear that the application for financial assistance submitted by Gary Manpower to the Department of Labor made a request for money but made no request for people or services. Appendix B, Infra, p. 9. Therefore, the subject of the grant or contract of assistance would be the money appropriated by Congress and applied for by Gary Manpower, rather than the CETA employees or their services which were not appropriated by Congress or requested in the application for financial assistance. Moreover, 42 U.S.C. § 2706 (3) (Supp. X, 1976)[1] defines financial assistance and provides that financial assistance includes assistance advanced by grant, agreement, or contract, but does not include the procurement of plant or equipment or goods or services. Therefore, according to 42 U.S.C. § 2706 (3) (Supp. X, 1976) the money applied for by Gary Manpower and not services procured with appro-

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1. The definition for financial assistance in 42 U.S.C. § 2706 (3) was used in conjunction with the "Manpower Program" in the Economic Opportunity Act which was replaced with the "Manpower Program" in the Comprehensive Employment Training Act of 1973. H.R. No. 659, 93d Cong. 2d Sess. 2936 (1973).

priated money, would be covered, if stolen, by 18 U.S.C. § 665. Consequently, in light of the proceeding, theft of services is not an offense, within the purview of 18 U.S.C. § 665 and the services of the CETA employees, which were paid for with federal money, would not be money, funds, assets or property which is the subject of the grant or contract of assistance. Therefore, the Supreme Court should review this case since it is the only decision construing 18 U.S.C. § 665, and since theft of services is not an offense within the purview of the prescription, See 18 U.S.C. § 665.

## II.

## THE SEVENTH CIRCUIT HAS RENDERED A DECISION WHICH CONFLICTS WITH A NINTH CIRCUIT DECISION.

In *United States* v. *Coleman,* the Seventh Circuit held that theft of services was an offense within the purview 18 U.S.C. § 665 of the United States Code. While in *Chappell* v. *United States,* 270 F. 2d (9th Cir. 1959), the Ninth Circuit held that theft of services was not an offense within the purview of 18 U.S.C. § 641 of the United States Code. Although the Courts in *Coleman* and *Chappell* were construing different statutes, both statutes are in chapter 31 of title 18, the embezzlement and theft statutes in the United States Code, and both statutes were promulgated to prohibit the theft of public money or property. See 18 U.S.C. §§ 641, 665. Therefore, because of the disagreement in the Ninth and Seventh Circuits as to whether or not theft of services is an offense within the purview of the embezzlement and theft statutes in chapter 31, and because the conflicting decisions have destroyed certainty and predictability in this area of the law, the Supreme Court should issue a Writ of Certiorari and resolve this conflict in the circuits.



## III.

## THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH SUPREME COURT DECISIONS.

The Supreme Court has on several occasions enunciated a variety of canons of construction to be used in interpreting federal criminal statutes. The opinion rendered in the case at bar by the Seventh Circuit ignored every applicable canon and reached a result inconsistent with these canons. In *Coleman*, the Seventh Circuit construed a statute which made it a crime to wrongfully obtain any "money, funds, assets, or property". See 18 U.S.C. § 665(a). When construing this portion of the statute, the Court held that "recognizing that the term property is protean, capable of assuming varied meanings depending on context, and that the criminal law does not of necessity adopt the most restrictive meaning as the 'literal terms', there is no reason to suppose that Congress intended to withhold protection from services purchased while extending protection to tangible property purchased". Appendix A, infra, p. 6-7. In reaching this conclusion, the Seventh Circuit ignored several very important canons of construction which this court has stated should be used in construing federal statutes. The Seventh Circuit's opinion ignored the canon that a criminal defendant is entitled to a reasonably strict construction of the law he is accused of violating. *See United States* v. *Fruit Express Company,* 279 U.S. 363, 369. This construction also ignored the canon that the federal judiciary is not to create crimes or enlarge the reach of criminal statutes by construing them from anything less than the incriminating components contemplated by the words used in the statute. *See Morissette* v. *United States,* 263 U.S. 246, 263. Additionally, according to the principles of ejusdem generis, where a general word follows a series of more specific words in a statute, the general

word's meaning is limited by the more specific words. *United States* v. *Powell,* 423 U.S. 87, 91. If these canons are applied to the case at bar, it becomes apparent that a court applying these canons would give the word "property" a different construction than the one given it by the Seventh Circuit. Clearly, the Seventh Circuit gave a very broad construction to the word "property." The Congressional Record in no way indicates that Congress intended to use the word in this manner. H.R. No. 659 93d Cong. 2d Sess. 2959. Moreover, the words "money", "funds", and "assets", when used in conjunction with the word "property," indicate that Congress had in mind tangible things rather than intangibles. Therefore, when the word "property" is viewed in the context of these more specific words, a court should limit the meaning of the word property to tangible things. Finally, the preceding clearly establishes that the Seventh Circuit has deviated from the Supreme Court's canons of construction by broadly construing 18 U.S.C. § 665 and has created a crime by construing the word property to include services when theft of services is not an offense delineated in the statute.

## IV.

## THE SEVENTH CIRCUIT'S DECISION VIOLATED THE THIRTEENTH AMENDMENT'S PROHIBITION AGAINST SLAVERY WHEN THE COURT HELD THAT CETA WORKER'S SERVICES, WHICH WERE PAID FOR WITH FEDERAL FUNDS, WERE PROPERTY OWNED BY THE FEDERAL GOVERNMENT.

In this theft of services prosecution the United States goevrnment had to prove it owned (52 A C.J.S. §1 (1) (1955)), had title to or possession of the property, the CETA workers services, which was allegedly stolen by the defendant. See *United States* v. *Farrell,* 418 F. Supp. 308,



(M.D. Pa. 1976). It is axiomatic that the United States (U.S.) can have title to real property (e.g. land) or personal property (e.g. automobiles) because these are chattels or things. See Black's Law Dictionary 1649 (4 rev. ed. 1968). But, the U.S. can not own or acquire title to or possession of people, including CETA workers, because people have not been chattels or things since the Thirteenth Amendment abolished slavery. Slavery exists whenever the law recognizes a right of property in a human being. *Robertson* v. *Baldwin,* 165 U.S. 275, 292. In *Coleman,* the Seventh Circuit recognized a right of property in human beings by holding "(a) right to benefit of services for which one pays is a property right. Appendix A, infra, p. 7. Therefore, according to the Seventh Circuit, the U.S. government acquired a property right in CETA workers' services by providing the funds which paid their wages. If certiorari is denied, the Seventh Circuit's decision will set a dangerous precedent because the U.S. will acquire a "property right" in all the people (e.g. welfare recipients) it subsidizes throughout the United States. Of course, the Seventh Circuit's holding is erroneous because the U.S. and no one else acquires a property right, because of the Thirteenth Amendment, in CETA workers or their services by paying their wages. A careful analysis of the Seventh Circuit's opinion reveals that the Court had to hold there was a property right in order to assist the U.S. in proving ownership, a material element of the offense of theft. However, because the U.S. does not own, have title to or possession of the CETA workers or their services (it is impossible to separate a worker from his labor, his services), there is no federal property (See *Patmore* v. *United States,* 1 F. 2d 8, 10 (6th Cir. 1924)) and therefore, no violation of 18 U.S.C. § 665. See *United States* v. *Farrell,* 418 F. Supp. 308, 311 (M.D. Pa. 1976).

## V.

## THE SEVENTH CIRCUIT'S DECISION VIOLATED THE PROHIBITION AGAINST EX POST FACTO LAWS WHEN THE COURT CONSTRUED THE WORD PROPERTY IN 18 U.S.C. § 665 TO INCLUDE SERVICES AND RETROSPECTIVELY APPLIED ITS CONSTRUCTION OF SECTION 665 TO THE ALLEGED CONDUCT OF THE ACCUSED.

The United States Constitution provides that "No . . . ex post facto law shall be passed." U.S. Const. Art. I § 9(3). While section 665 was passed prior to the alleged conduct complained about in the indictment, theft of services did not become an offense, it was not delineated in the prescription, until the Court of Appeals construed the statute to include the offense. By construing the statute to include theft of services, the Court of Appeals made an action, done before its construction, criminal. Therefore, the prohibition against ex post facto laws was violated when the court restrospectively applied its construction of the statute to the conduct of the defendant which was complained about in the indictment.

## VI.

## THE SEVENTH CIRCUIT SANCTIONED SUCH A DEPARTURE BY THE LOWER COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

The Sixth Amendment to the United States Constitution guarantees an accused person a fair trial. In order to effectuate this amendment, Congress promulgated the Federal Rues of Evidence and the Federal Rules of Criminal Procedure. These rules prescribe the evidence which is admissible and the procedure which is to be followed during a trial. The defendant maintains that the Seventh Circuit



sanctioned a departure from the rules and from the accepted and usual course of judicial proceedings by approving the introduction of inadmissible Hatch Act evidence and by approving the erroneous instructions given by the judge over the objections of the defendant.

### A.

### The Defendant's Sixth Amendment Right To A Fair Trial Was Violated When Inadmissible Hatch Act Evidence Was Admitted At The Trial.

The trial court permitted a Department of Labor Representative, who was not qualified as an expert, to express an opinion about the Hatch Act and political conduct proscribed by the Hatch Act, and the Seventh Circuit approved this testimony in its opinion. Appendix A, infra, p. 7. The representative's testimony was not relevant because section 665 does not prohibit political activities (See 18 U.S.C. § 665), and because the defendant was not charged in the indictment with violating the Hatch Act. Moreover, the Hatch Act specifically excludes the defendant from the purview of the prohibition because the defendant was a City employee paid with City funds and not with loans or grants paid by the United States or a federal agency. See 15 U.S.C. § 1501(4)(a). While the Court of Appeals is correct that 29 U.S.C. § 990 incorporates the Hatch Act prohibitions and prohibits all forms of political activities by agencies and personnel which get CETA funds, the Court apparently overlooked 1) the fact that 15 U.S.C. § 1501(4)(a) specifically excludes the defendant from the purview of the Hatch Act, and 2) the fact that General Services, the defendant's agency, received no CETA funds. Appendix B, infra, p. 8. Therefore, the evidence couldn't be used to show the commission of another offense because Coleman, the Assistant Director of General Services, was not subject to the Hatch Act.

The labor representative also testified about political activity which is proscribed by the Hatch Act. By permitting this testimony, the court permitted the witness to invade its province by instructing the jury on the law. See *United States* v. *McCullough,* 427 F. Supp. 246 (D.C. Pa. 1977). In *McCullough,* the court was presented with a similar problem, and the court held that only the court can instruct the jury on the law and that a witness invades the court's province when he expresses an opinion on issues of law which are exclusively in the court's domain.

The trial court also permitted two other witnesses to testify about the defendant's political activities (poltical sign making). However, the evidence should have been excluded since it related to another crime, since there was no Hatch Act violation charged in the indictment and since defendant was not subject to the Hatch Act.

The Court of Appeals also approved, sub silencio, the cross examination of the defendant about his political activities. The trial court should have excluded this evidence because the cross examination of the accused exceeded the scope of direct examination and the accused was not charged with violating the Hatch Act in the indictment nor was he subject to it. Therefore, all the political evidence was inadmissible in a theft of services prosecution under 18 U.S.C. § 665.

In conclusion, the Supreme Court will assist the lower courts in nullifying First Amendment Rights (the right to engage in political activities) if political evidence is admitted at trial when the defendant is neither charged with nor subject to the Hatch Act.



**B.**

**The Defendant's Sixth Amendment Right To A Fair Trial Was Violated When The Jury Was Improperly Instructed By The Trial Judge.**

The Court of Appeals also approved the trial court's instructions in this case by holding that the defendant's failure to tender specific instructions defining the words "wilfully misapplies", "steals" or "obtains by fraud" constituted a waiver. Appendix A, infra, p. 7-8. However, the Seventh Circuit erred because the defendant is not required to tender instructions on the government's theory of the case and the defendant preserved the issues for review by objecting to the instructions before the judge instructed the jury. The defendant submits that an examination of instruction numbers 6, 7 and 8 reveals that the offenses "embezzle," "willfully misapplies," "steals," or "obtains by fraud" are used together throughout the instructions. Appendix B, Infra, p. 2-3. However, embezzlement is the only offense that was defined by the Court in instruction number 11. Appendix B, infra, p. 4. By so instructing the jury and singling out embezzlement, the Court directed the jury to the offense it thought the defendant was guilty of committing since the other offenses were left undefined. Moreover, the jury was directed to the offense of embezzlement because this was the only offense the jury inquired about when they sent a note to the judge asking him about the exact meaning of what embezzlement curtails in this case. Appendix B, infra, p. 5. Defendant contends that all the offenses should have been defined or they should have been left undefined otherwise you run into the problem of the jury only considering if the defendant embezzled the services of CETA employees which is a legal impossibility (ownership of property, herein services, can't be proved by the government).

Instruction number 8 required the jury to find five essential elements in order to prove the defendant guilty of the crime beyond a reasonable doubt. The defendant submits that it is arguable as to whether or not he is connected in any capacity with an agency receiving financial assistance under CETA. However, the defendant submits that the law conclusively establishes that the services of the CETA participants were not the subject of a grant or contract of assistance. See 42 U.S.C. § 2706(3) (Supp. X, 1976). Therefore, the defendant submits that the court erred by asking the jury to make findings of fact which are inconsistent with the evidence thereby making the court's instruction erroneous as a matter of law.

The defendant also submits that the trial court also erred by giving instruction number 10 which defined the services of an employee paid by federal funds provided under a grant or contract of assistance as constituting "assets or property" for the purposes of the violation. Appendix B, infra, p. 4. By defining services of an employee paid by federal funds as constituting "assets or property," the court made it unnecessary for the jury to consider if the defendant received money, funds, assets or property which are the subject of a grant or contract of assistance as they were required to do in instruction number 8. As a result of the preceding, the trial court invaded the jury's province and directed them to make findings of fact which are inconsistent with the law and culminated in a guilty verdict.

The defendant submits that by defining the offense of embezzlement and leaving the other offenses undefined, by asking the jury to make findings of fact which are inconsistent with the law, and by defining services of federal employees paid under a grant as assets or property thereby



directing the jury to find the defendant guilty, the lower courts violated the rights of the accused because the instructions, when considered as a whole, misled the jury. Finally, the evidence introduced during the trial and the instructions given at the conclusion of the trial was such a departure from the Federal Rules of Evidence and the Federal Rules of Criminal Procedure that the Supreme Court should exercise its supervisory power to effectuate the fair trial guarantees of the Sixth Amendment.

## CONCLUSION

For the reasons set out above, Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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# APPENDIX A

IN THE

## UNITED STATES COURT OF APPEALS
## FOR THE SEVENTH CIRCUIT

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No. 77-1844

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

NATHANIEL COLEMAN,

*Defendant-Appellant.*

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Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 76-Cr-118—Phil M. McNagny, Jr., *Judge.*

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ARGUED SEPTEMBER 11, 1978—DECIDED DECEMBER 18, 1978

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Before FAIRCHILD, *Chief Judge,* NICHOLS, *Associate Judge*•, and WOOD, *Circuit Judge.*

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• Associate Judge Philip Nichols of the United States Court of Claims is sitting by designation.

FAIRCHILD, *Chief Judge*. Appellant Coleman was convicted of an offense defined by 18 U.S.C. § 665.[1]

Count I of the indictment charged that:

> ". . . Coleman, being the assistant director of the General Services Department of the City of Gary, Indiana, an agency receiving financial assistance under the Comprehensive Employment and Training Act of 1973, did embezzle, wilfully misapply, steal and obtain by fraud for his own personal use and enrichment for political purposes, moneys, funds, assets and property which were the subject of a grant under said Act, to wit: the services of employees participating in the Adult Work Experience Program of the Gary Manpower Administration, a prime sponsor under the Comprehensive Employment and Training Act of 1973 which services were a value of . . . $4,500. . . ."

Defendant moved for dismissal, asserting among other things that services of employees are not "moneys, funds, assets, or property" under 18 U.S.C. § 665. The district court denied the motion, concluding that the word "property" is broad enough to encompass services, and that the

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1. 665. Theft or embezzlement from manpower funds—Improper inducement.—(a) Whoever being an officer, director, agent, or employee of, or connected in any capacity with, any agency receiving financial assistance under the Comprehensive Employment and Training Act of 1973 embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a grant or contract of assistance pursuant to this Act shall be fined not more than $10,000 or imprisoned for not more than two years, or both; but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $100, he shall be fined not more than $1,000, or imprisoned not more than one year, or both.



theft, embezzlement or misapplication of "services" paid for by funds supplied under a CETA grant is an offense described in § 665.

Count I was tried, with a verdict of guilty, the only other count being dismissed before trial.

The proof reflected the theory of Count I, that a city employee's use for private benefit of the services of trainees, under a CETA program, compensated out of CETA funds, amounted to embezzlement or willful misapplication of property which was the subject of the CETA grant.

The evidence established that a special crew of five men, paid with CETA funds, was assigned by Gary Manpower (an agency of the City) to the General Services Department of the City, of which Coleman was Assistant Director. Despite limitations imposed upon use of such employees by statute regulations[2] precluding their use for political purposes and personal enrichment, Coleman directed the crew to construct political signs for the mayoral primary cam-

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2. 29 U.S.C. § 990 provides:

> § 990. Political activities prohibited
>
> The Secretary shall not provide financial assistance for any program under this Act which involves political activities; and neither the program, the funds provided therefor, nor personnel employed in the administration thereof, shall be, in any way or to any extent, engaged in the conduct of political activities in contravention of chapter 15 of title 5, United States Code [5 USCS §§ 1501 et seq.].

29 U.S.C. § 845(c)(3) requires assurances by the prime sponsor that "the public services provided by such jobs . . . be designed to benefit the residents of the area."

paign, and to perform various tasks in his construction business and otherwise for private benefit.[3]

To obtain a conviction under § 665 the government must prove two elements:

(1) that the accused was an officer, director, agent or employee of, or connected in any capacity with an agency receiving financial assistance under CETA;

(2) that the accused embezzled, willfully misapplied, stole, or obtained by fraud "moneys, funds, assets, or property which are the subject of a grant or contract of assistance."

Defendant appears to argue that under the arrangements for the CETA grant,[4] Gary Manpower, rather than the City

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3. During the summer of 1975 AWEP workers painted houses, constructed a dog run and dog house, poured a residential foundation, built a fence, and fulfilled contracts Coleman had with the Veterans' Administration (VA) to maintain yards in VA held homes and to clean the Coroner's office. Menial chores around Colmen's home were also done by AWEP personnel.

4. Department of Labor testimony at trial explained the funding arrangements as follows: CETA programs are funded by the Department of Labor and administered by state and local governments, (the prime sponsors). The prime sponsor either administers the program directly or uses subagencies working for it to carry out the program activities. In this case, the City of Gary, (the prime sponsor), and the Department of Labor signed an agreement in which, Gary Manpower was designated as the local agency with regulatory responsibilities over the funds. Gary Manpower administered two programs for the prime sponsor: the Adult Work Experience Program (AWEP) which pro-

*(Footnote continued on next page)*



of Gary, was the "agency receiving financial assistance" under CETA, and that defendant, a city employee attached to a different department of the City, did not fulfill element (1) above. It may well be argued that the City itself was the "agency receiving financial assistance" under CETA, so that any employee of the City fulfills element (1). Even if a narrower view be taken, that Gary Manpower was the "agency," there was an agreement that the City's General Services Department would use some of the trainees, and defendant was Assistant Director of that Department. We think that defendant had sufficient responsibility for participation in the program so that he would be deemed "connected in any capacity" with Gary Manpower for the purpose of § 665.

Defendant further argues that services of persons compensated out of grant money are not "property . . . the subject of a grant" and that misappropriation of such services is not theft, embezzlement, or willful misapplication of such property.

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*(Footnote continued from preceding page)*

vided short-term employment (6 months to one year) in sub-professional jobs and the Public Service Employment Program (PSEP) which provided extended employment (one to two years) at the journeyman level. Administrative expenses and wages for program participants were paid directly by Gary Manpower from the Department of Labor grant funds. Because the primary purpose of CETA is to provide employment and training, Gary Manpower entered into subordinate agreements with other municipal agencies for the use of AWEP trainees. The General Services Department of which defendant-appellant Coleman was Assistant Director had entered into such an agreement. The agreement involved no payment between the two municipal agencies, however. General Services was bonded to issue GMA checks during the employment period.

The decision of the Ninth Circuit in *Chappell* v. *United States*, 270 F. 2d 274, 276-78 (1959) provides some support for defendant's contention that § 665 should be construed narrowly and according to the more traditional meanings of its terms. In *Chappell* an Air Force sergeant was charged with converting to his own use the services of an airman in painting, during duty hours, property of the sergeant. The statute there considered provided a penalty for one who "knowingly converts to his use . . . any record, voucher, money, or thing of value of the United States . . . or any property made or being made under contract for the United States." Applying strict construction, the court decided that the services misappropriated were not a thing of value subject to conversion.

The Third Circuit has recently suggested that *Chappell* had been too narrowly decided, although in the present case the court found a technical larceny and thus did not need to reach a broader interpretation of § 641. *United States* v. *Di Gilio*, 538 F. 2d 972, 978 (3d Cir. 1976). These cases under § 641 are the closest cited to the situation at hand.

Whatever the proper interpretation of § 641, we have a different statute before us. Congress was entrusting large sums of non-federal agencies to accomplish the purposes of CETA. A principal purpose was providing paying jobs to trainees. In § 665 Congress was exerting its power to protect these funds from misuse at the hands of employees of these agencies. Concededly as to tangible property the protection extended to that which was purchased by the funds as well as the funds themselves. Much of the funds, however, were expected to be spent to compensate people for services; the programs are intended to generate jobs. Recognizing that the term "property" is protean, capable of assuming varied meanings depending on context, and that the criminal law does not of necessity adopt the most re-



strictive meaning as the "literal terms," there is no reason to suppose that Congress intended to withhold protection from services purchased while extending the protection to tangible property purchased. Willful misapplication of services generated by the granted funds is indistinguishable from willful misapplication of funds themselves. A right to benefit of services for which one pays a property right. In the CETA context, we feel a contrary result would accomplish an absurd interpretation of the statute, one that should not be imputed to Congress by a court having the proper degree of respect for that body. Thus, we think the word "property" need not be narrowly construed so as to include tangibles, but exclude services.

Accordingly, we agree with the district court that the services of trainees contemplated by the program and compensated by the granted funds were property which is the subject of a CETA grant and that a § 665 offense has been charged and proved.

We find no error in the district court's permitting a witness to testify with regard to provisions of the Hatch Act as they applied to AWEP participants assigned to the City of Gary. Under 29 U.S.C. § 990, *supra*, note 4, all forms of political activity are forbidden agencies and personnel which get CETA funds. Section 990 specifically incorporates the Hatch Act's prohibitions. Thus, testimony regarding the Hatch Act could have been the substance of an instruction. It would be relevant to the question whether making political signs by AWEP workers was appropriately paid for with CETA funds.

We find no reversible error as a result of the trial court's failure to provide definition of the terms "willfully misapplies," "steals," or "obtain by fraud." The only term

defined by the court was "embezzlement." The record shows, however, that instructions tendered by appellant Coleman did not include definitions of these additional terms. We agree with the government's position that failure to tender specific instruction constituted a waiver and that there was not plain error.

The judgment of the district court is AFFIRMED.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*



United States District Court

FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA<br><br>vs.<br><br>NATHANIEL COLEMAN | Hammond<br>Criminal No.<br>H CR 76-118<br>18 U.S.C.<br>665; 1503 |

The Grand Jury charges:

**COUNT I**

From on or about the 1st day of May, 1975, up to and including the 30th day of August, 1975 at the City of Gary, Indiana in the Northern District of Indiana, NATHANIEL COLEMAN, being the assistant director of the General Services Department of the City of Gary, Indiana, an agency receiving financial assistance under the Comprehensive Employment and Training Act of 1973, did embezzle, willfully misapply, steal and obtain by fraud for his own personal use and enrichment for political purposes, moneys, funds, assets and property which were the subject of a grant under said Act, to wit: the services of employees participating in the Adult Work Experience Program of the Gary Manpower Administration, a prime sponsor under the Comprehensive Employment and Training Act of 1973 which services were of a value of four thousand, five hundred dollars ($4,500.00) more or less, in violation of Section 665, Title 18 of the United States Code.

## COUNT II

On or about the 14th day of September, 1976, at Gary, Indiana in the Northern District of Indiana, NATHANIEL COLEMAN did corruptly endeavor to influence and impede Myrtle King, a witness before the September, 1975 Special Grand Jury of the United States District Court of the Northern District of Indiana, in violation of Section 1503, Title 18 of the United States Code.

A TRUE BILL:

....., Foreman.

John R. Wilks
United States Attorney

By: Richard A. Hanning
Assistant United States Attorney

## COURT INSTRUCTION NO. 6

The indictment alleges the defendant to have embezzled, misapplied, stolen or obtained by fraud, moneys, funds or assets with a value exceeding $100. The crime charged necessarily includes a lesser offense where the amount so embezzled, misapplied, stolen or obtained by fraud does not exceed $100.



## COURT'S INSTRUCTION NO. 7

Section 665, Title 18 of the United States Code provides in part that: Whoever, being an officer, director, agent or employee of . . . any agency receiving financial assistance under the Comprehensive Employment and Training Act of 1973 embezzles, willfully misapplies, steals or obtains by fraud any of the moneys, funds, assets or property which are the subject of a grant or contract of assistance . . . shall be guilty of an offense against the laws of the United States.

## COURT'S INSTRUCTION NO. 8

Before you may find the defendant guilty of Count I of the indictment, the following essential elements must each be proved beyond a reasonable doubt:

1) That the defendants is an officer, director, agent or employee of an agency receiving financial assistance under the Comprehensive Employment and Training Act of 1973 [hereinafter referred to as the Act];
2) That the defendant received moneys, funds, assets or property which are the subject of a grant or contract of assistance pursuant to the Act;
3) That the defendant did so by one of the following means: embezzlement, willful misapplication, stealing or obtaining by fraud;
4) That the amount of money or funds or the value of the assets or property exceeds $100; and
5) That the defendant acted knowingly and willfully.

## COURT'S INSTRUCTION NO. 10

Services of an employee paid by federal funds provided under a grant or contract of assistance pursuant to the Comprehensive Employment and Training Act of 1973, constitute "assets or property" for the purposes of this violation.

## COURT'S INSTRUCTION NO. 11

To "embezzle" means willfully to take, or convert to one's own use, another's money or property, of which the wrongdoer acquired possession lawfully, by reason of some office or employment or position of trust.

To convert money or property to one's own use means to apply, or appropriate, or use, such money or property for the benefit or profit of the wrongdoer.



6/23/77

Judge:

We need clarification on the exact meaning on what embezzlement curtails as in this case. "Does property include Gov't. funded employees"? according to the definition of embezzlement provided to us.

6/24/77

TOM CAPPER
Foreperson

C. B. YATES

8:34 P.M.

## GARY MANPOWER ADMINISTRATION
## ADULT WORK EXPERIENCE AGENCY AGREEMENT

This Agreement entered into this 26th day of June, 19—, by and between the Gary Manpower Administration (hereinafter referred to as G.M.A.), and General Services, a public/private non-profit agency, (hereinafter referred to as Agency/User Agency).

WITNESSETH THAT:

WHEREAS, the Gary Manpower Administration desires to engage the General Services Agency to provide work training experience and priority in hiring, based on the progress of the GMA/Adult Work Experience participant, (hereinafter referred to as AWE).

NOW, THEREFORE, the parties hereto do mutually agree as follows:

A. *Scope of Services:* The Agency will properly and satisfactorily, as determined by the Gary Manpower Administration, perform the following services:

1. Develop job descriptions (not in the so-called "dead-end" category) for each AWE participant assigned to said agency. (See statement of purpose and procedures).
2. Become familiar with and adhere to the Fair Labor Standards Act regulations.
3. Provide proper and adequate supervision to GMA/AWE participants.
4. Keep accurate records on attendance and progress of the GMA/AWE participants.
5. Provide an agency supervisor capable of actively assisting the GMA participant in properly and accurately completing the time sheets.



6. Make sure the GMA/AWE participant sign his/her time sheet daily.
7. Make sure the time sheets are properly and accurately completed and available each Tuesday, to be picked up by the GMA Job Coach Hernandez.
8. Issue GMA/AWE participant checks Friday or every other Friday at the end of the day.
9. Become as familiar with the GMA/AWE participant as with regular agency employees.
10. Make sure that the GMA/AWE participants know the rules, regulations and policies that govern all persons employed by the said agency.
11. Provide safe and healthy work standards.
12. Explain the necessity of safe work habits.
13. Provide sufficient training for the GMA/AWE participants to do an adequate job without the need for additional outside training.
14. Provide counseling geared to elevate the GMA/AWE participants attitude and understanding of the expectations of the job performance and potential for advancement.
15. Encourage the GMA/AWE participant to study and practice his/her skills or profession when not performing assigned duties.
16. Secure Gary Manpower Administration's approval prior to assigning GMA/AWE participants to work outside said agency or GMA jurisdiction.
17. Exert every effort to hire GMA/AWE participants upon their completion of work training (preferably in area of experience or training).

B. *Time of Performance:* This Agreement covers the period of May 1, 1975 to Sept. —, 19—.

C. *Termination of Agreement:* This Agreement may be terminated with or without cause by either party, upon 10 days written notice.

D. *Compensation and Method of Payment:* This Agreement involves no payment between Gary Manpower Administration and said agency. Agency is, however, bonded to issue GMA checks to AWE participants during this agreement period. Agency will provide the same fringe benefits, if possible, to GMA/AWE participants as regular agency employees during this agreement period.

E. Anticipated number to be assigned ——.

F. This Agreement is subject to renewal on ————, 19—, should additional services be requested by either parties to the agreement.

IN WITNESS HEREOF, the parties have affixed their signature this 26th day of June, 1975.

By: JESSE STEVE MORRIS.

APPROVED BY:

.....

OMB NO 99-R0188

**APPLICATION FOR FEDERAL ASSISTANCE (NONCONSTRUCTION PROGRAMS)**

U.S. Dept. of Labor — PART I

1. State Clearinghouse Identifier: 74-015-R

2. Applicant's Application No:

3. Federal Grantor Agency: Manpower Administration
Organizational Unit: Chicago Regional Office
Administrative Office: 300 South Wacker Drive
Street Address - P.O. Box
Chicago, Illinois 60606
City State Zip Code

4. Applicant Name: Gary Manpower
City of Gary/ Administration
Department Division
401 Broadway
Street Address - P.O. Box
Gary Lake
City County
Indiana 46402
State Zip Code

5. Descriptive Name of the Project
Comprehensive Employment and Training Program

6. Federal Catalog No.

7. Federal Funding Requested
$ 4,627,980

8. Grantee Type
___ State, ___ County, X City, ___ Other (Specify)

9. Type of Application or Request
X New Grant, ___ Continuation, ___ Supplement, ___ Other Changes (Specify)

10. Type of Assistance
X Grant, ___ Loan, ___ Other (Specify)

11. Population Directly Benefiting from the Project
3,141

12. Length of Project
12 months

13. Congressional District
a. Indiana I
b. Indiana I

14. Beginning Date
August 26, 1974

15. Date of Application

16. The applicant certifies that to the best of his knowledge and belief the data in this application are true and correct, and that he will comply with the grant if he receives the grant.

Typed name: Richard G. Hatcher
Title: Mayor
Telephone Number: AREA CODE 219 NUMBER 944/6501 EXT.
Signature of Authorized Representative

For Federal Use Only

No. 78-1124

# In the Supreme Court of the United States

OCTOBER TERM, 1978

NATHANIEL COLEMAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

SIDNEY M. GLAZER
CHRISTIAN F. VISSERS
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is not yet reported.

## JURISDICTION

The judgment of the court of appeals was entered on December 18, 1978. The petition for a writ of certiorari was filed on January 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether misappropriation of the labor of employees paid with federal funds under the Comprehensive Employment and Training Act of 1973 is punishable under 18 U.S.C. 665.

2. Whether the trial court was required to define certain terms used in its instructions to the jury.

3. Whether testimony referring to the Hatch Act was properly admitted at trial.

## STATUTE INVOLVED

18 U.S.C. 665(a) provides in pertinent part:

> Whoever, being an officer, director, agent, or employee of, or connected in any capacity with, any agency receiving financial assistance under the Comprehensive Employment and Training Act of 1973 embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a grant or contract of assistance pursuant to this Act shall be fined not more than $10,000 or imprisoned for not more than two years, or both; but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $100, he shall be fined not more than $1,000, or imprisoned not more than one year, or both.

## STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on one count of embezzling and willfully misapplying property and funds subject to a federal grant under the Comprehensive Employment and Training Act (CETA), in violation of 18 U.S.C. 665. He was sentenced to a one-year term of imprisonment. The court of appeals affirmed (Pet. App. A1-A8).

Pursuant to the provisions of CETA, the Department of Labor entered into an agreement with the City of Gary, Indiana. Under that agreement, the Gary Manpower Administration (a city office responsible for funding) was authorized to administer various employment programs, including an Adult Work Experience Program



("Program") providing short-term sub-professional jobs (Tr. 90-97). Salaries of Program employees were paid by Gary Manpower with funds disbursed by the Department of Labor (Tr. 96-97, 112-115; Pet. App. A3). Under a subordinate agreement entered into between Gary Manpower and the city's General Services Department (GSD), Program trainees were assigned to GSD for work in that agency. Petitioner was the assistant director of GSD (Tr. 125-137; Pet. App. B6-B8).

In April 1975, petitioner took control of a special five-man crew of Program participants. Petitioner instructed this crew to work in a mayoral primary campaign, to provide labor for his private construction business, and to perform menial chores around his home (Pet. App. A4).[1] Petitioner used CETA trainees to construct and distribute political signs (Tr. 166, 170-172, 373, 412) and to paint houses for his construction company (Tr. 708-722). While working for petitioner's company, they also built a dog run and a shelter (Tr. 215-231), a residential foundation (Tr. 694-707), and fences (Tr. 722-732, 648-687, 688-693). In addition, petitioner used these employees throughout the summer to provide maintenance work (Tr. 733-751) and custodial services (Tr. 414-415, 419-423, 201-210) under private contracts. While engaged in these activities, the CETA employees were unavailable to perform the public services for which they were paid under the federal program.

## ARGUMENT

1. Petitioner contends (Pet. 8-10) that 18 U.S.C. 665 proscribes only misappropriation of money or tangible property subject to a federal grant, and that misappropriation of the labor of employees paid for by the

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[1] Under 29 U.S.C. 990, CETA funds may not be used to support "political activities." CETA funds may be used only to provide "public services" beneficial to the community. 29 U.S.C. 845(c)(3).

federal government is not an offense. Petitioner acknowledges (Pet. 8) that the decision below is the first to consider this issue under Section 665, which alone is reason for this Court to decline review of the issue at this time. In any event, the decision below is correct.

The statute makes it a crime for any employee connected with an agency receiving CETA funds to embezzle, misapply, steal, or obtain by fraud "any of the moneys, funds, assets, or property which are the subject of a grant or contract of assistance * * *." This prohibition provides broad protection against wrongdoing by those entrusted with federal grants. By employing the word "any," by separately enumerating money, funds, assets, and property, and by describing in various alternative ways the prohibited means for misappropriating such wealth, Congress obviously manifested an intention to sweep broadly. The terms used by Congress do not lend themselves to restrictive interpretation. See, generally, *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941); *United States* v. *Culbert*, 435 U.S. 371, 373 (1978). Nothing in the comprehensive language used by Congress suggests that the statute should be limited to "tangible" property interests.

As the court of appeals recognized, the right to receive services stemming from the payment of money under a contract of employment is a form of property interest.[2] A contractual right to services is a type of wealth similar to other kinds of intangible property rights. See, *e.g.*, *In Re Ira Haupt & Co.*, 424 F. 2d 722, 724 (2d Cir. 1970). There is, moreover, no significant difference between

[2]Although the legislative history does not provide a definition of the term "property," the customary legal meaning of the term "extends to every species of valuable right and interest," including "tangible or intangible" interests. *Black's Law Dictionary* 1382 (1968 ed.).



diverting the labor of employees paid by the federal government and diverting the funds used to pay them. The money of the federal government is misappropriated to the same degree by either device. As the court below noted: "[w]illful misapplication of services generated by the granted funds is indistinguishable from willful misapplication of funds themselves" (Pet. App. A7). The construction proposed by petitioner would create a gaping hole in the protection of the integrity of CETA programs that was clearly Congress's purpose in enacting Section 665.

Petitioner's assertion that the term "property" should be limited to "tangible things" (Pet. 12) is, moreover, refuted by the case law construing statutes similar to 18 U.S.C. 665. Thus, under 18 U.S.C. 641, which prohibits, *inter alia*, theft of property belonging to the United States, it is well settled that theft of intangible interests is forbidden. See, *e.g.*, *United States* v. *DiGilio*, 538 F. 2d 972, 976-978 (3d Cir. 1976) (misappropriation of various resources including the "time" of a government employee during "working hours"). See also *United States* v. *Lambert*, 446 F. Supp. 890, 896 (D. Conn. 1978) (misappropriation of information stored in a government computer).[3] Similarly, under the Hobbs Act, 18 U.S.C. 1951, which forbids obtaining the property of another person by threats of violence, it is settled that "property" is "not limited to physical or tangible property or things * * * but includes, in a broad sense, any valuable right considered as a source or element of wealth * * *." *United*

[3]The early case of *Chappell* v. *United States*, 270 F. 2d 274, 277 (9th Cir. 1959), relied on by petitioner, held that Section 641 does not apply to intangibles such as services of government employees. Later cases in the Ninth Circuit appear to have abandoned the tangible property requirement. See *United States* v. *Friedman*, 445 F. 2d 1076, 1087 (9th Cir.), cert. denied, 404 U.S. 958 (1971). In any event, the Ninth Circuit's prior interpretation presents no conflict here, because a different statute is involved. See Pet. App. A6.

*States* v. *Tropiano*, 418 F. 2d 1069, 1075 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970). See also *United States* v. *Nadaline*, 471 F. 2d 340, 344 (5th Cir.), cert. denied, 411 U.S. 951 (1973); *United States* v. *Santoni*, 585 F. 2d 667, 672-673 (4th Cir. 1978), cert. denied, No. 78-843 (Feb. 21, 1979) ("the property extorted was the right * * * to make a business decision free from outside pressure wrongfully imposed * * *").[4]

There is no ground for construing the language used by Congress in 18 U.S.C. 665 in a narrower fashion. As noted by the court of appeals:

> Congress was entrusting large sums of non-federal agencies to accomplish the purposes of CETA. A principal purpose was providing paying jobs to trainees. In § 665 Congress was exerting its power to protect these funds from misuse at the hands of employees of these agencies. * * * Recognizing that the term "property" is protean, capable of assuming varied meanings depending on context, and that the criminal law does not of necessity adopt the most restrictive meaning as the "literal terms," there is no reason to suppose that Congress intended to withhold protection from services purchased while extending the protection to tangible property purchased. * * * In the CETA context, we feel a contrary result would accomplish an absurd interpretation of the statute, one that should not be imputed to Congress * * *.

[4]The terms "property" and "goods" have frequently been construed to embrace intangible rights and interests under other federal criminal statutes prohibiting theft and fraud. See, *e.g.*, *United States* v. *Louderman*, 576 F. 2d 1383, 1387 (9th Cir.), cert. denied, No. 78-5084 (Oct. 10, 1978) (scheme to defraud telephone company of confidential information); *United States* v. *Bottone*, 365 F. 2d 389, 393-394 (2d Cir. 1966) (interstate transportation of copies of papers disclosing stolen trade secrets); *United States* v. *Lester*, 282 F. 2d 750, 755 (3d Cir. 1960), cert. denied, 364 U.S. 937 (1961) (interstate transportation of photocopies of stolen maps).



Pet. App. A6-A7.[5]

2. The district court defined the terms "embezzle" and "convert * * * to one's own use" in its charge to the jury (Tr. 1047-1048). Petitioner argues that the court also was required to define the terms "willfully misapplies," "steals," and "obtains by fraud" (Pet. 17). However, as noted by the court below, petitioner did not object to the district court's charge in compliance with Fed. R. Crim. P. 30, which required him to "stat[e] distinctly the matter to which he objects and the grounds of his objection." Petitioner only objected in general terms and did not direct the attention of the district court to the terms that he now asserts required further definition (Tr. 993). Moreover, petitioner did not tender instructions defining the terms in question. In these circumstances, he has waived the right to object. See *United States* v. *Hollinger*, 553 F. 2d 535, 546 (7th Cir. 1977); *United States* v. *Milby*, 400 F. 2d 702, 707 (6th Cir. 1968).

In any event, petitioner's contention is without merit because the terms in question required no further elaboration. Each of the terms left undefined by the district court was synonomous with wrongful taking and was well within the common understanding of the jury. See *United States* v. *Orzechowski*, 547 F. 2d 978, 985-986 (7th Cir. 1976), cert. denied, 431 U.S. 906 (1977); *United States* v. *Long*, 534 F. 2d 1097, 1100 (3d Cir. 1976).

3. Petitioner's final contention (Pet. 15) is that the district court improperly admitted testimony referring to the Hatch Act, 5 U.S.C. 1501 *et seq.*, which proscribes

[5]Although criminal statutes are to be strictly construed, they should not be construed so strictly as to defeat the purpose of the legislature. See, *e.g.*, *Barrett* v. *United States*, 423 U.S. 212, 218 (1976); *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 354-355 (1943). Petitioner received fair warning from the statute that his systematic diversion of labor paid for by federal grants could constitute a misappropriation of government funds and property interests. See, generally, *United States* v. *Powell*, 423 U.S. 87, 93 (1975).

partisan political activities by state and local governmental employees. At trial, a Labor Department officer responsible for monitoring programs under CETA described the employment and training arrangement between the Department of Labor and Gary, Indiana. He noted that approval of the federal grant was contingent upon receiving assurances from the city that it would comply with all legal requirements, including the Hatch Act, and would prohibit political activities by program participants (Tr. 91-97, 98-99).[6] He further testified that officials involved in the administration of CETA projects are not permitted to participate in political activities during working hours, but disclaimed knowledge of the "ins and outs of the Hatch Act" (Tr. 99).[7]

The district court was within its discretion in permitting the representative of the Department of Labor to describe the basic requirements of the CETA program. Petitioner's disregard of those requirements was further evidence that he intended to use the five CETA trainees for improper purposes. By diverting the services of these employees into partisan political activities, petitioner willfully misapplied funds and property interests subject to the CETA grant, in violation of 18 U.S.C. 665.

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[6]29 U.S.C. 990 specifically incorporates the Hatch Act's prohibition of political activities by agency personnel.

[7]The General Services Department, of which petitioner was the assistant director, supervised and trained CETA employees and issued checks on behalf of Gary Manpower to compensate them. Petitioner was clearly involved in the administration of the CETA program and therefore was not permitted to engage in political activity or to require trainees to engage in political activity.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

SIDNEY M. GLAZER
CHRISTIAN F. VISSERS
*Attorneys*

MARCH 1979

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1124

NATHANIEL COLEMAN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition for a Writ of Certiorari
To The United States Court of
Appeals For The Seventh Circuit

## REPLY BRIEF

CHESTER SLAUGHTER,
188 West Randolph Street,
Chicago, Illinois 60601,

PHILANDER S. NEVILLE, JR.,
4320 Vincennes,
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312/373-5155.

*Attorneys for Petitioner.*

Keenan Printing Company 312-648-0050 365

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

**No. 78-1124**

NATHANIEL COLEMAN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition for a Writ of Certiorari
To The United States Court of
Appeals For The Seventh Circuit

## REPLY BRIEF

## OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on December 18, 1978. The petition for a writ of certiorari was filed on January 17, 1979. The brief in opposition for the United States was filed on March 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



## I.

## ARGUMENT

In point one of its brief the respondent acknowledges that the instant case presents a question of first impression. Then the respondent argues, without any citation to authority, that this reason alone would not justify review by this court (Res. 4). The petitioner would ask the court to note that the respondent misstates the facts because his petition enumerated six reasons for this court to grant the writ of certiorari (Pet. 8-19). The petitioner would also ask the court to note that the respondent failed to consider two constitutional questions raised in the petitioner's brief: (1) whether the Seventh Circuit's decision violated the Thirteenth Amendment's prohibition against slavery when the court held that CETA workers services, which were paid for with federal funds, were property owned by the federal government (Pet. 12-13), and (2) whether the Seventh Circuit's decision violated the prohibition against Ex Post Facto Laws when the court construed the word property in 18 U.S.C. 665 to include services and retrospectively applied its construction of section 665 to the alleged conduct of the accused (Pet. 14). Finally, the petitioner submits that by failing to consider the constitutional questions raised in his brief the respondent sub silentio agrees with the petitioner's position.

The respondent's next argument is that the terms used by Congress do not lend themselves to restrictive interpretation (Res. 4). Petitioner submits that the words in section 665 do lend themselves to a restrictive interpretation. First, section 665 is restricted to people connected with an agency receiving financial assistance. Second, section 665 prohibits the theft of money, funds, assets or property. Third, section 665 applies to money, funds, assets or

property which are the subject of a grant or contract of assistance. The language in section 665 clearly indicates an intention by Congress to restrict the scope of the statute to people connected with an agency receiving financial assistance, and to things which are the subject of a grant or contract of assistance. Finally, if this court examines the contract of assistance (Pet. B. 9), it will discover that money ($4,627,980), and not the services of the CETA employees, was the subject of the grant or contract of assistance.

Next, the respondent argues that a contractual right to services is a type of wealth similar to other types of property rights (Res. 4). But, the respondent overlooked the fact that the United States never entered into a contract with the CETA workers. The CETA workers applied for jobs with Gary Manpower, a city agency. Therefore, since there was no contract between the United States and the CETA workers, since the CETA workers were not hired by the United States to perform specific jobs (e.g. paint a federal building) for the United States of America, and since the CETA workers had no skills but were deprived persons who needed work experience, the respondent's argument (that a contractual right to services is a type of wealth similar to other kinds of intangible property rights) has no merit.

By making the preceding argument, the respondent skirts the threshold question in a theft of services prosecution: whether the government owned the property, the services of the CETA employees, which the government alleges was stolen in the indictment (Pet. B. 1). Ownership must be established by the respondent in the instant case because it is a material element of the offense of theft.

The government also argues that there is no significant difference between diverting the labor of employees paid



by the federal government and diverting the funds used to pay them (Res. 4-5). Petitioner disagrees with the respondent and submits that there is a significant difference in the two acts. Diverting the labor of CETA employees is not an offense within the purview of section 665. However, diverting the funds used to pay CETA employees is an offense within the purview of section 665. Moreover, the indictment does not allege and the evidence does not establish that the petitioner stole any funds. The only reason the government wants the two distinct acts to be one and the same is so the alleged conduct of the petitioner can be brought within the purview of 18 U.S.C. 665. However, since theft of services is not an offense under 18 U.S.C. 665, the respondent's argument is erroneous and this court should grant certiorari and reverse this case.

The respondent's next argument is that the construction proposed by the petitioner would create a gaping hole in the protection of the integrity of CETA programs (Res. 5). The petitioner disagrees with the respondent's argument because under 29 U.S.C. 982 the Secretary is empowered to withhold funds which are improperly spent by a prime sponsor or an eligible applicant. Section 29 U.S.C. 991 (b) delineates other remedies, civil actions, that are available to the Secretary. By promulgating these two statutes, Congress has clearly enacted legislation to protect CETA money. But, most importantly, an examination of 42 U.S.C. 2706 (3) (Sup. p. X. 1976)[1] establishes that Congress intended to protect financial assistance such as money but did not intend to protect services which were procured with federal money. Therefore, the respondent's argument has no merit.

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1. (3) the term "financial assistance" includes assistance advanced by grant, agreement, or contract, but does not include the procurement of plant, or equipment, or goods or services.

The respondent's next argument is that under 18 U.S.C. 641 (the general theft statute) and under 18 U.S.C. 1951 (the Hobbs Act) the term "property" has been construed to include tangible and intangible things (Res. 5). While the term "property" in sections 641 and 1951 may be subject to a broad construction, the term "property" in section 665, the statute under review in this case, is subject to a restrictive construction because the property must be "the subject of a grant or contract of assistance". See 18 U.S.C. 665. And this court will determine, after examining the contract of assistance (Pet. B. 9), that the subject of the contract of assistance was money (tangible property) and not services (intangible property). Consequently, the respondent's argument has no merit.

## II.

In point two the respondent argues that the petitioner did not object to the district court's charge in compliance with Fed. R. Crim. P. 30, which required him to "stat(e) distinctly the matter to which he objects and the grounds of the objection" (Res. 7). The respondent also argues that petitioner only objected in general terms. The following objection was made by defense counsel at the trial:

> "Mr. Slaughter: We do have objection to the Court's instructions. I would inform the Court that our objections go to the terms which are used throughout the various instructions, those terms being the word "embezzled", the word "misapply", the phrase "obtain by fraud", the words "money, funds or assets". We would indicate to the Court, those terms apply throughout many of the instructions. Not only do we object to the words, we also object because there is no definition for the terms and phrases, other than for the word "embezzled". There is a definition for the word "embezzle".



> There are no definitions in the instructions we have of any of the other terms and phrases that we have recited to the Court.

Petitioner submits that the objection stated distinctly the matter to which he objected and the grounds of the objection and, therefore, was in compliance with the Federal Rules of Criminal Procedures.

The respondent also argues that the terms required no further elaboration, and that the terms left undefined by the district court were synonomous with wrongful taking and were well within the common understanding of the jury (Res. 7). If the terms required no further elaboration and if the terms were within the common understanding of the jury, then petitioner wonders why the jury sent the judge a note asking him to clarify embezzlement, the only defined term (Pet. B. 5). The petitioner submits that the jury's note establishes two things: (1) that the jury was confused and (2) that the respondent's argument is devoid of merit. Finally, the petitioner submits that he objected to the court's instructions, therefore, the court's failure to properly instruct the jury violated his substantial rights (the right to a fair trial) and constitutes plain error (Pet. 17-18).

## III.

The respondent's final argument is that the district court was within its discretion in permitting the representative from the Department of Labor to describe the basic requirements of the CETA program (Res. 7-8). Petitioner submits that the Federal Rules of Evidence and the case law would exclude the opinion testimony given by the Labor Representative (See Pet. 15-16). Petitioner would ask the Court to note that the respondent neglected to explain the

relevance of Hatch Act Testimony in a theft case where the accused was not charged in the indictment with violating the Hatch Act or subject to it. Finally, the petitioner submits that the trial judge improperly admitted the opinion evidence and violated his Sixth Amendment right to a fair trial.

## CONCLUSION

For the reasons set forth in the Petitioner's petition, Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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